

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

FILED BY CLERK

MAR 23 2007

COURT OF APPEALS  
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	
Respondent,	)	2 CA-CR 2006-0387-PR
	)	DEPARTMENT B
v.	)	
	)	<u>MEMORANDUM DECISION</u>
	)	Not for Publication
WEALTHY DAVID THOMAS, SR.,	)	Rule 111, Rules of
	)	the Supreme Court
Petitioner.	)	
	)	

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PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20033777

Honorable Michael J. Cruikshank, Judge

REVIEW GRANTED; RELIEF DENIED

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DiCampli & Elsberry, L.L.C.  
By Anne Elsberry

Tucson  
Attorneys for Petitioner

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E C K E R S T R O M, Presiding Judge.

¶1 A jury found petitioner Wealthy Thomas, Sr. guilty of selling a narcotic drug, aggravated assault with a deadly weapon, and possessing a deadly weapon during the commission of a felony drug offense. The trial court sentenced him to a combination of enhanced, concurrent and consecutive, presumptive prison terms totaling twenty-seven

years. This court affirmed the convictions and sentences on appeal. *State v. Thomas*, No. 2 CA-CR 2004-0300 (memorandum decision filed Feb. 10, 2006).

¶2 After we issued our mandate in April 2006, Thomas filed a timely notice of post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., 17 A.R.S. In the petition for post-conviction “review” that followed, he raised three of the four issues he had previously raised on appeal. He complained about the trial court’s denial of his request for either disclosure of the identity of a witness or an instruction pursuant to *State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964), and its denial of his motion for new trial that had been based on prosecutorial misconduct and judicial misconduct.

¶3 Thomas acknowledged that the issues presented in his petition for post-conviction relief are the same issues he raised on appeal:

The issues raised below are the same as those raised on direct appeal. However, on direct appeal not all the issues were raised in the context of a violation of Mr. Thomas’s federal and state constitutional rights. In order to exhaust these issues and preserve them for further review, Petitioner restates the issues.

The trial court first addressed Thomas’s arguments on their merits before ruling that the issues raised, “having been addressed and denied during trial and on appeal, are precluded. In addition, they are substantively without merit.” The trial court thus denied relief, and this petition for review followed.

¶4 We review a trial court’s ruling on a petition for post-conviction relief only for an abuse of the court’s discretion, *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82

(1990), and we find no abuse here. Counsel’s acknowledgment of the obvious—that the issues raised in Thomas’s petition below were previously raised on appeal—brings those issues squarely within Rule 32.2(a)(2). It provides: “A defendant shall be precluded from relief under this rule based upon any ground: . . . (2) [f]inally adjudicated on the merits on appeal . . . .” *Id.*

¶5 Having raised these very issues on appeal, Thomas was precluded from raising them again in a petition for post-conviction relief. Consequently, the trial court did not abuse its discretion in denying relief. We grant the petition for review but likewise deny relief.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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J. WILLIAM BRAMMER, JR., Judge

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PHILIP G. ESPINOSA, Judge